



Billing Code: 8025-01

SMALL BUSINESS ADMINISTRATION

13 CFR Parts 121 and 134

RIN 3245-AG82

Rules of Procedure Governing Cases Before the Office of Hearings and Appeals

AGENCY: U. S. Small Business Administration.

ACTION: Proposed rule.

SUMMARY: The U.S. Small Business Administration (SBA) is proposing to amend the rules of practice of its Office of Hearings and Appeals (OHA) to implement Section 869 of the National Defense Authorization Act for Fiscal Year 2016. This legislation authorizes OHA to decide Petitions for Reconsideration of Size Standards. This rule also proposes to revise the rules of practice for OHA appeals of agency employee grievances.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN: 3245-AG82 by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail, Hand Delivery/Courier: Delorice Price Ford, Assistant Administrator for Hearings and Appeals, U.S. Small Business Administration, 409 Third Street, SW, Washington, DC 20416.

SBA will post all comments on www.regulations.gov. If you wish to submit confidential business information (CBI) as defined in the User Notice at www.regulations.gov, please submit the information to Linda (Lin) DiGiandomenico,

Attorney Advisor, Office of Hearings and Appeals, U.S. Small Business Administration, 409 Third Street, SW, Washington, DC 20416, or send an email to OHA@sba.gov.

Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: Linda (Lin) DiGiandomenico, Attorney Advisor, at (202) 401-8206 or OHA@sba.gov.

SUPPLEMENTARY INFORMATION:

This proposed rule would amend the rules of practice for the SBA's Office of Hearings and Appeals (OHA) in order to implement section 869(b) of the National Defense Authorization Act for Fiscal Year 2016, Public Law 114-92, 129 Stat. 726, November 25, 2015 (NDAA 2016). This legislation added a provision to section 3(a) of the Small Business Act to authorize OHA to hear and decide Petitions for Reconsideration of Size Standards (Size Standard Petitions or Petitions). A Size Standard Petition may be filed at OHA after SBA publishes a final rule in the Federal Register to revise, modify, or establish a size standard. This proposed rule would create a new subpart I in OHA's regulations (13 CFR part 134) to set out detailed rules of practice for Size Standard Petitions, revise OHA's general rules of practice in subparts A and B of part 134 as required by the new legislation, and amend SBA's small business size regulations (13 CFR part 121) to include Size Standard Petitions as part of SBA's process for establishing size standards.

This proposed rule also would revise the rules of practice for OHA appeals of agency employee grievances, in concert with SBA's revisions of its Standard Operating Procedure (SOP) 37 71, The Employee Dispute Resolution Process.

Section-by-Section Analysis

A. Part 121

SBA proposes to amend § 121.102, the rules for establishing size standards, to provide for Petitions for Reconsideration of Size Standards (Size Standard Petitions or Petitions), pursuant to 15 U.S.C. 632(a)(9). New paragraph (e) would require SBA to include instructions for filing a Size Standard Petition in any final rule revising, modifying, or establishing a size standard. The rule would inform the public that, as stated in the NDAA 2016, any Petition for reconsideration of a size standard must be filed no later than 30 days after the final rule is published. New paragraph (f) would require SBA to publish a notice in the Federal Register within 14 calendar days after a Size Standard Petition is filed. Among other things, the notice would let interested parties know that they may intervene in the dispute. New paragraph (g) would require SBA to publish notice in the Federal Register where SBA grants a petition for reconsideration of a size standard that had been revised or modified.

B. Part 134, subpart A

In § 134.101, SBA proposes to revise the definition for "AA/OHA" to include the new statutory title "Chief Hearing Officer". SBA also proposes to add definitions for "Administrative Judge" (including the new statutory title "Hearing Officer"), "Petitioner" (as the party who initially files a petition), and "Size Standard Petition" (citing 15 U.S.C. 632(a)(9) and subpart I of part 134).

Section 134.102 lists the cases in which OHA has authority to conduct proceedings. In paragraph (r), on Employee Disputes, SBA proposes to remove the reference to "Appropriate Management Official" (AMO), a term being eliminated from the EDRP. Paragraph (t) permits the Administrator to refer matters to OHA through a SOP, Directive, Procedural Notice, or individual request. Section 869(a)(3) of the NDAA 2016, repealed this regulatory provision. As a result, SBA proposes to amend paragraph (t) by removing the current text and adding in its place, the authority for OHA to accept Size Standard Petitions.

Part 134, subpart B

Section 134.201 would be amended to redesignate paragraph (7) as paragraph (8) and to add a new paragraph (7), which would state that the rules of practice governing Size Standard Petitions cases are at new subpart I of part 134.

Section 134.227 would be amended to list Size Standard Petitions as a type of case in which OHA would issue a final decision. To effect this change, the rule proposes to redesignate paragraph (b)(4) as paragraph (b)(5) and adding a new paragraph (b)(4).

C. Part 134, subpart H

The rules of practice governing Employee Dispute appeals would be revised to correspond to revisions being made to Standard Operating Procedure (SOP) 37 71.

Section 134.801 lists the rules in subparts A and B that also apply to Employee Dispute appeals. SBA proposes to remove paragraph (b)(11) from the list because this rule proposes to include all rules of practice governing the review of initial decisions in § 134.809.

Section 134.803 governs the commencement of appeals. SBA proposes to revise the section heading and paragraphs (a) and (b) to reflect the elimination of the term "AMO" from the EDRP, and to shorten the Employee's deadline for filing the appeal in the event the Agency declines to issue an appealable "Step Two" decision. The current rule requires the employee to file an appeal "no sooner than 16 days and no later than 55 days from the date on which the Employee filed the original Statement of Dispute." The proposed rule would revise that time to "no later than 15 calendar days from the date the Step Two decision was due." This change would simplify the Employee's deadline for filing an appeal.

SBA proposes to revise § 134.804, which sets out the requirements for filing an appeal petition, including the contents of the petition, the supporting information to be submitted with it, as well as the requirements for service of the petition. The rule proposes to amend paragraphs (a) (1) through (a) (3) and paragraph (b) to conform the descriptions of the required information to the terms used in the EDRP. Specifically, the term "Statement of Dispute" would be replaced with "SBA Dispute Form 2457"; and references to "AMO's decision" and "AMO Official" would be replaced with "Step One decision" and/or "Step Two decision" or "Step Two Official" as applicable. The rule would also remove paragraph (a)(6), which currently requires the Employee to provide fax numbers, home mailing addresses and other contact information. In addition, because SBA Form 2457 contains a certificate of service, the rule proposes to remove paragraph (c), which requires employees to file a separate certificate of service. Revised § 134.805(d) would provide that email, rather than U.S. Mail, is the default method by which OHA serves orders and the decision.

Section 134.807(a) currently requires SBA to file the "Dispute File." In place of that, the proposed rule would require SBA to file "any documentation, not already filed by the Employee, that it wishes OHA to consider," thus reducing wasteful duplication of paper. In paragraph (b), SBA proposes to shorten the deadline for filing the response to an Employee's appeal from "no later than 15 days from the conclusion of mediation or 45 days from the filing of the appeal petition, whichever is later" to "15 calendar days" in place of "15 days" and "45 days." This change would simplify the deadline for filing a response to an Employee's appeal. Revised paragraph (c) would eliminate the reference to the "Dispute File."

Section 134.808(a), on the decision, would be revised to update terminology.

Section 134.809 concerns review of OHA's initial decision. The revised rule would allow only certain SBA officials to request a review of OHA's initial decision. The official would be required to request the OHA file within five calendar days after receiving the decision. OHA would have five days to provide copies to both the official and to the Employee, and the official would have 15 calendar days from receipt of the file to state his or her objections to the OHA decision. As before, the Employee does not have the right to request a review of OHA's initial decision.

D. Part 134, subpart I

SBA proposes to add Subpart I setting forth the rules of practice before OHA for Petitions for Reconsideration of Size Standards pursuant to 15 U.S.C. 632(a)(9).

Proposed § 134.901 states that the provisions of subparts A and B also apply to Size Standard Petitions, except where inconsistent with rules set out in subpart I.

As proposed in Section 134.902(a), any person "adversely affected" by a new, revised, or modified size standard would have standing to file a Petition within 30 days

from the date of publication of the final rule promulgating that size standard. Paragraph (b) would provide that a business entity is not "adversely affected" unless it conducts business in the industry associated with the size standard being challenged and either it qualified as a small business concern before the size standard was revised or modified, or it would be qualified as a small business concern under the size standard as revised or modified.

Section 134.903(a) would reiterate the statutory deadline for filing a Petition, which is "not later than 30 days after" the final rule is published in the Federal Register that revises, modifies, or establishes a new size standard; would clarify that the days counted are calendar days; and would authorize OHA to dismiss an untimely Petition. Paragraph (b) would require OHA to dismiss as premature a Petition filed in response to a notice of proposed rulemaking. The retention of an existing size standard is not considered to be the revision, modification, or establishment of a standard and is not subject to these procedures. Paragraph (c) would require OHA to dismiss challenges to the retention of an existing size standard.

Section 134.904(a) would require a Petition to identify the challenged size standard or standards and include the following: a copy of the final rule being challenged or an electronic link to the rule; a statement as to why the process used by SBA to revise, modify, or establish the size standard is alleged to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, together with supporting argument; a copy of any comments on the challenged size standard(s) that Petitioner had submitted in response to notice of proposal rulemaking on the size standard being petitioned (or a statement that none were submitted); and basic contact information for

Petitioner or its attorney. Section 134.904(b) would permit multiple size standards from the same final rule to be challenged in a single Petition, but the Petitioner must demonstrate standing for each challenged size standard. Section 134.904(c) would require the same formatting standards as are required for size appeals under Section 134.305. Section 134.904(d) would require the Petitioner to serve a copy of the Petition on SBA's Office of Size standards as well as the Office of General Counsel. Section 134.904(e) would require a signed certificate of service similar to that required by 134.204(d) for size appeals.

Section 134.905 would set out OHA's procedures on receipt of a Petition. These include assignment to a Judge, initial review, and issuance of a notice and order setting the deadline for SBA to send the administrative record (typically seven calendar days after issuance of the notice and order) and setting the close of record (typically 45 calendar days from filing).

Section 134.906 would permit interested persons with a direct stake in the outcome of the case to intervene and obtain a copy of the Petition. Where a Petition contains confidential information, the intervenor's attorney may obtain a complete copy under the terms of a protective order, similar to the procedures used in size appeals.

Section 134.907 would establish the same filing and service rules as apply to other OHA proceedings.

Section 134.908 would require SBA to submit to OHA a copy of the documentation and analysis supporting the revision, modification, or establishment of the challenged size standard, and would permit the Petitioner and any intervenor, on request, to review this information.

Section 134.909 would provide the standard of review, which is whether the process employed by SBA to arrive at the size standard "was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." Also, the Petitioner would bear the burden of proof, and OHA would not adjudicate arguments for a different size standard.

Section 134.910 would require OHA to dismiss a Petition if : (i) it does not allege facts that, if proven true, would warrant remand of the size standard;(ii) the Petitioner is not adversely affected by the challenged size standard; (iii) the Petition is untimely, premature, or is not otherwise filed according to the requirements; or (iv) the matter has been decided by or is currently before a court of competent jurisdiction.

Section 134.911 would allow an intervenor to file a response to the Petition, presenting argument, before the close of record. SBA also may intervene.

Section 134.912 would not permit discovery, and would permit oral hearings only if the Judge determines that the case cannot be resolved without live testimony and the confrontation of witnesses. These rules are similar to the rules in size appeals.

Under § 134.913, cases would be decided based on the pleadings and the administrative record. The Judge may admit new evidence on motion establishing good cause.

Section 134.914 would require OHA to issue a decision within 45 calendar days after close of record, as practicable. The rule would also establish that the decision is final and will not be reconsidered.

Under § 134.915, if OHA grants a Size Standard Petition, OHA would not assign a size standard to the industry in question. Rather, the case would be remanded to the

Office of Size Standards for further analysis. Once remanded, OHA no longer has jurisdiction over the case unless a new Petition is filed as a result of a new final rule.

Section 134.916 would require SBA to rescind the challenged size standard if OHA grants a Petition. The size standard in effect prior to the final rule would be restored until a new final rule is issued. If OHA denied a Petition, the size standard in the final rule would remain.

Section 134.917 would state that because Size Standard Petition proceedings are not required to be conducted by an Administrative Law Judge, attorney's fees are not available under the Equal Access to Justice Act.

Section 134.918 would reiterate the statutory provision in NDAA 2016 that, for purposes of seeking judicial review of a new size standard, the publication of a final rule in the Federal Register to revise, modify, or establish size standards is considered the final agency action. This section would also make it clear that the filing of a Size Standard Petition would not be required before seeking judicial review.

Compliance with Executive Orders 12866, 12988, 13175 and 13132, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601-612)
Executive Order 12866

OMB has determined that this rule does not constitute a "significant regulatory action" under Executive Order 12866. This rule is also not a major rule under the Congressional Review Act, 5 U.S.C. 800. This rule establishes the procedures for Petitions for Reconsideration of Size Standards at SBA's Office of Hearings and Appeals (OHA) and revises procedural rules at OHA for agency employee grievances. As such, the rule has no effect on the amount or dollar value of any Federal contract requirements

or of any financial assistance provided through SBA. Therefore, the rule is not likely to have an annual economic effect of \$100 million or more, result in a major increase in costs or prices, or have a significant adverse effect on competition or the United States economy. In addition, this rule does not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency, materially alter the budgetary impact of entitlements, grants, user fees, loan programs or the rights and obligations of such recipients, nor raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Executive Order 12988

This action meets applicable standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

Executive Order 13175

For the purposes of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, SBA has determined that this proposed rule will not have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. Therefore, SBA determines that this proposed rule does not require consultations with tribal officials or warrant the publication of a Tribal Summary Impact Statement.

Executive Order 13132

This rule does not have Federalism implications as defined in Executive Order 13132. It will not have substantial direct effects on the States, on the relationship between

the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in the Executive Order. As such it does not warrant the preparation of a Federalism Assessment.

Paperwork Reduction Act

The SBA has determined that this rule does not impose additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601-612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. Small entities include small businesses, small not-for-profit organizations, and small governmental jurisdictions. Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

This proposed rule would revise the regulations governing cases before SBA's Office of Hearings and Appeals (OHA), SBA's administrative tribunal. These regulations are procedural by nature. Specifically, the proposed rule would establish rules of practice for Petitions for Reconsideration of Size Standards (Size Standard Petitions), a new type of administrative litigation mandated by § 869(b) of the National Defense Authorization Act for Fiscal Year 2016. This legislation provides a new statutory right to challenge a size standard revised, modified, or established by the SBA through a final rule. Further, this legislation requires OHA to hear any Size Standard Petitions that are filed. This proposed rule merely provides the rules of practice for the orderly hearing and disposition of Size Standard Petitions at OHA. While SBA does not anticipate that this

proposed rule would have a significant economic impact on any small business, we do welcome comments from any small business setting out how and to what degree this proposed rule would affect it economically.

The Small Business Size Regulations provide that persons requesting to change existing size standards or to establish new size standards may address these requests to SBA's Office of Size Standards. 13 CFR § 121.102(d). Over the past five years, fewer than ten letters concerning size standards have been submitted per year, supporting SBA's belief that this proposed rule will not affect a substantial number of small entities. Further, a business adversely affected by a final rule revising a size standard has always had (and would continue to have) the option of judicial review in Federal court, yet the SBA knows of no such lawsuit ever having been filed.

In addition to establishing rules of practice for Size Standard Petitions, this proposed rule would revise OHA's rules of practice for SBA Employee Disputes. This rulemaking is procedural, would impose no significant additional requirements on small entities, and would have minimal, if any, effect on small entities.

Therefore, the Administrator of SBA certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

List of Subjects

13 CFR Part 121

Administrative practice and procedure, Government procurement, Government property, Grant programs—business, Individuals with disabilities, Loan programs—business, Small businesses.

13 CFR Part 134

Administrative practice and procedure, Claims, Equal access to justice, Lawyers, Organization and functions (Government agencies).

For the reasons stated in the preamble, SBA proposes to amend 13 CFR parts 121 and 134 as follows:

PART 121--SMALL BUSINESS SIZE REGULATIONS

1. The authority citation for part 121 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 662, and 694a(9).

2. Amend § 121.102 by adding paragraphs (e), (f), and (g) to read as follows:

§ 121.102 How does SBA establish size standards?

* * * * *

(e) When SBA publishes a final rule in the Federal Register revising, modifying, or establishing a size standard, SBA will include in the final rule, an instruction that interested persons may file a petition for reconsideration of a revised, modified, or established size standard at SBA's Office of Hearings and Appeals (OHA) within 30 calendar days after publication of the final rule in accordance with 15 U.S.C. § 632(a)(9) and part 134, subpart I of this chapter. The instruction will provide the mailing address, facsimile number, and email address of OHA.

(f) Within 14 calendar days after a petition for reconsideration of a size standard is filed, unless it appears OHA will dismiss the petition for reconsideration, SBA will publish a notice in the Federal Register announcing a size standard or standards that have been challenged, the Federal Register citation of the final rule, the assigned OHA docket number, and the date of the close of record. The notice will further state that interested

parties may contact OHA to intervene in the dispute pursuant to § 134.906 of this chapter.

(g) Where OHA grants a petition for reconsideration of a size standard that had been revised or modified, SBA will publish a notice in the Federal Register meeting the requirements of § 134.916(a) of this chapter.

PART 134--RULES OF PROCEDURE GOVERNING CASES BEFORE THE OFFICE OF HEARINGS AND APPEALS

3. The authority citation for part 134 is revised to read as follows:

Authority: 5 U.S.C. 504; 15 U.S.C. 632, 634(b)(6), 634(i), 637(a), 648(l), 656(i), and 687(c); E.O. 12549, 51 FR 6370, 3 CFR, 1986 Comp., p. 189.

4. Amend § 134.101 by revising the definitions of "AA/OHA" and "Judge"; and by adding definitions for "Administrative Judge", "Petitioner", and "Size Standard Petition" in alphabetical order, to read as follows:

§ 134.101 Definitions.

* * * * *

AA/OHA means the Assistant Administrator for OHA, who is also the Chief Hearing Officer.

* * * * *

Administrative Judge means a Hearing Officer, as described at 15 U.S.C. § 634(i), appointed by OHA to adjudicate cases.

* * * * *

Judge means the Administrative Judge or Administrative Law Judge who decides an appeal or petition brought before OHA, or the AA/OHA when he or she acts as an Administrative Judge.

* * * * *

Petitioner means the person who initially files a petition before OHA.

* * * * *

Size Standard Petition means a petition for reconsideration of a revised, modified, or established size standard filed with OHA pursuant to 15 U.S.C. § 632(a)(9) and subpart I of this part.

5. Amend § 134.102 by revising paragraphs (r) and (t) to read as follows:

§ 134.102 Jurisdiction of OHA.

* * * * *

(r) Appeals from SBA Employee Dispute Resolution Process cases (Employee Disputes) under Standard Operating Procedure (SOP) 37 71 (available at <http://www.sba.gov/tools/resourcelibrary/sops/index.html> or through OHA's Website <http://www.sba.gov/oha>) and subpart H of this part;

* * * * *

(t) Petitions for reconsideration of revised, modified, or established size standards pursuant to 15 U.S.C. 632(a)(9).

6. Amend § 134.201 by:

a. Removing the word "and" in paragraph (b)(6);

- b. Redesignating paragraph (b)(7) as paragraph (b)(8); and
- c. Adding a new paragraph (b)(7).

The addition to read as follows:

§ 134.201 Scope of the rules in this subpart B.

* * * * *

(b) * * *

(7) For Size Standard Petitions, in subpart I of this part (§134.901 et seq.); and

* * * * *

7. Amend § 134.227 by:

- a. Removing the word "and" in paragraph (b)(3);
- b. Redesignating paragraph (b)(4) as paragraph (b)(5); and
- c. Adding a new paragraph (b)(4).

The addition to read as follows:

§ 134.227 Finality of decisions.

* * * * *

(b) * * *

(4) Size Standard Petitions; and

* * * * *

§ 134.801 [Amended]

8. Amend § 134.801 by adding the word "and" at the end of paragraph (b)(9); by removing the word "and" at the end of paragraph (b)(10) and adding a period in its place; and by removing paragraph (b)(11).

9. Amend § 134.803 by:

- a. Revising the section heading; and
- b. Revising paragraphs (a) and (b).

The revisions to read as follows:

§ 134.803 Commencement of appeals from SBA Employee Dispute Resolution Process cases (Employee Disputes).

(a) An appeal from a Step Two decision must be commenced by filing an appeal petition within 15 calendar days from the date the Employee receives the Step Two decision.

(b) If the Step Two Official does not issue a decision within 15 calendar days of receiving the SBA Dispute Form from the Employee, the Employee must file his/her appeal petition at OHA no later than 15 calendar days from the date the Step Two decision was due.

* * * * *

10. Amend § 134.804 by

- a. Revising paragraphs (a)(1), (a)(2), and (a)(3),
- b. Adding the word “and” after the semicolon in paragraph (a)(5);
- b. Removing paragraph (a)(6);
- c. Redesignating paragraph (a)(7) as paragraph (a)(6);
- d. Revising paragraph (b)(1);
- e. Removing paragraph (c); and
- f. Redesignating paragraphs (d) and (e) as paragraphs (c) and (d).

The revisions to read as follows:

§ 134.804 The appeal petition.

(a) * * *

(1) The completed SBA Dispute Form;

(2) A copy of the Step One and Step Two decisions, if any;

(3) Statement of why the Step Two decision (or Step One decision, if no Step Two decision was received), is alleged to be in error;

* * * * *

(b) * * *

(1) The Step Two Official;

* * * * *

§ 134.805 [Amended]

11. Amend § 134.805 by removing from paragraph (d) the term "U.S. Mail" and adding in its place the term "email".

§ 134.807 [Amended]

12. Amend 134.807 as follows:

a. By removing from paragraph (a), the words "a copy of the Dispute File" and adding, in their place, the words "any documentation, not already filed by the Employee, that it wishes OHA to consider";

b. By removing from paragraph (b), the words "15 days" and "45 days" and adding, in both their places, the words "15 calendar days"; and

c. By removing from paragraph (c), the words "and the Dispute File are normally the last submissions" and by adding, in their place, the words "is normally the last submission".

§ 134.808 [Amended]

13. Amend § 134.808(a) by removing the word "AMO's" and adding in its place the words "Step One or Step Two".

14. Revise § 134.809 to read as follows:

§ 134.809 Review of initial decision.

(a) If the Chief Human Capital Officer, General Counsel for SBA, or General Counsel for the IG believes OHA's decision is contrary to law, rule, regulation, or SBA policy, that official may file a Petition for Review (PFR) of the decision with the Deputy Administrator (or IG for disputes by OIG employees) for a final SBA Decision. Only the Chief Human Capital Officer, General Counsel, or IG may file a PFR of an OHA decision; the Employee may not.

(b) To file a PFR, the official must request a complete copy of the dispute file from the Assistant Administrator for OHA (AA/OHA) within five calendar days of receiving the decision. The AA/OHA will provide a copy of the dispute file to the official, the Employee, and the Employee's representative within five calendar days of the official's request. The official's PFR is due no later than 15 calendar days from the date the official receives the dispute file. The PFR must specify the objections to OHA's decision.

15. Add subpart I to read as follows:

Subpart I--Rules of Practice for Petitions for Reconsideration of Size Standards

Sec.

134.901 Scope of the rules in this subpart I.

134.902 Standing.

134.903 Commencement of cases.

134.904 Requirements for the Size Standard Petition.

134.905 Notice and order.

134.906 Intervention.

134.907 Filing and service.

134.908 The administrative record.

134.909 Standard of review.

134.910 Dismissal.

134.911 Response to the Size Standard Petition.
134.912 Discovery and oral hearings.
134.913 New evidence.
134.914 The decision.
134.915 Remand.
134.916 Effects of OHA's decision.
134.917 Equal Access to Justice Act.
134.918 Judicial review.

Subpart I--Rules of Practice for Petitions for Reconsideration of Size Standards

§ 134.901 Scope of the rules in this subpart I.

- (a) The rules of practice in this subpart I apply to Size Standard Petitions.
- (b) Except where inconsistent with this subpart, the provisions of subparts A and B of this part apply to Size Standard Petitions listed in paragraph (a) of this section.

§ 134.902 Standing.

(a) A Size Standard Petition may be filed with OHA by any person that is adversely affected by the Administrator's decision to revise, modify, or establish a size standard.

(b) A business entity is not adversely affected unless it conducts business in the industry associated with the size standard that is being challenged and:

(1) The business entity qualified as a small business concern before the size standard was revised or modified; or

(2) The business entity qualifies as a small business under the size standard as revised or modified.

§ 134.903 Commencement of cases.

(a) A Size Standard Petition must be filed at OHA not later than 30 calendar days after the publication in the Federal Register of the final rule that revises, modifies, or

establishes the challenged size standard. An untimely Size Standard Petition will be dismissed.

(b) A Size Standard Petition filed in response to a notice of proposed rulemaking is premature and will be dismissed.

(c) A Size Standard Petition challenging a size standard that has not been revised, modified, or established through publication in the Federal Register will be dismissed.

§ 134.904 Requirements for the Size Standard Petition.

(a) Form. There is no required form for a Size Standard Petition. However, it must include the following information:

(1) A copy of the final rule published in the Federal Register to revise, modify, or establish a size standard, or an electronic link to the final rule;

(2) A full and specific statement as to which size standard(s) in the final rule the Petitioner is challenging and why the process that was used to revise, modify, or establish each challenged size standard is alleged to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, together with argument supporting such allegation;

(3) A copy of any comments the Petitioner submitted in response to the proposed notice of rulemaking that pertained to the size standard(s) in question, or a statement that no such comments were submitted; and

(4) The name, mailing address, telephone number, facsimile number, email address, and signature of the Petitioner or its attorney.

(b) Multiple size standards. A Petitioner may challenge multiple size standards that were revised, modified, or established in the same final rule in a single Size Standard

Petition, provided that the Petitioner demonstrates standing for each of the challenged size standards.

(c) Format. The formatting provisions of § 134.203(d) apply to Size Standard Petitions.

(d) Service. In addition to filing the Size Standard Petition at OHA, the Petitioner must serve a copy of the Size Standard Petition upon each of the following:

(1) SBA's Office of Size Standards, U.S. Small Business Administration, 409 3rd Street, S.W., Mail Code 6530, Washington, DC 20416, facsimile number (202) 205-6390; or sizestandards@sba.gov; and

(2) SBA's Office of General Counsel, Associate General Counsel for Procurement Law, U.S. Small Business Administration, 409 3rd Street, S.W., Washington, DC 20416; facsimile number (202) 205-6873; or OPLService@sba.gov.

(e) Certificate of Service. The Petitioner must attach to the Size Standard Petition a signed certificate of service meeting the requirements of § 134.204(d).

§ 134.905 Notice and order.

Upon receipt of a Size Standard Petition, OHA will assign the matter to a Judge in accordance with § 134.218. Unless it appears that the Size Standard Petition will be dismissed under § 134.910, the presiding Judge will issue a notice and order initiating the publication required by § 121.102(f) of this chapter; specifying a date for the Office of Size Standards to transmit to OHA a copy of the administrative record supporting the revision, modification, or establishment of the challenged size standard(s); and establishing a date for the close of record. Typically, the administrative record will be due

seven calendar days after issuance of the notice and order, and the record will close 45 calendar days from the date of OHA's receipt of the Size Standard Petition.

§ 134.906 Intervention.

In accordance with § 134.210(b), interested persons with a direct stake in the outcome of the case may contact OHA to intervene in the proceeding and obtain a copy of the Size Standard Petition. In the event that the Size Standard Petition contains confidential information and the intervener is not a governmental entity, the Judge may require that the intervener's attorney be admitted to a protective order before obtaining a complete copy of the Size Standard Petition.

§ 134.907 Filing and service.

The provisions of § 134.204 apply to the filing and service of all pleadings and other submissions permitted under this subpart unless otherwise indicated in this subpart.

§ 134.908 The administrative record.

The Office of Size Standards will transmit to OHA a copy of the documentation and analysis supporting the revision, modification, or establishment of the challenged size standard by the date specified in the notice and order. The Chief, Office of Size Standards, will certify and authenticate that the administrative record, to the best of his or her knowledge, is complete and correct. The Petitioner and any interveners may, upon request, review the administrative record submitted to OHA. The administrative record will include the documentation and analysis supporting the revision, modification, or establishment of the challenged size standard.

§ 134.909 Standard of review.

The standard of review for deciding a Size Standard Petition is whether the process employed by the Administrator to revise, modify, or establish the size standard was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. OHA will not adjudicate arguments that a different size standard should have been selected. The Petitioner bears the burden of proof.

§ 134.910 Dismissal.

The Judge must dismiss the Size Standard Petition if:

(a) The Size Standard Petition does not, on its face, allege specific facts that if proven to be true, warrant remand of the size standard;

(b) The Petitioner is not adversely affected by the final rule revising, modifying, or establishing a size standard;

(c) The Size Standard Petition is untimely or premature pursuant to § 134.903 or is not otherwise filed in accordance with the requirements in subparts A and B of this part; or

(d) The matter has been decided or is the subject of adjudication before a court of competent jurisdiction over such matters.

§ 134.911 Response to the Size Standard Petition.

Although not required, any intervenor may file and serve a response supporting or opposing the Size Standard Petition at any time prior to the close of record. SBA may intervene as of right at any time in any case until 15 days after the close of record, or the issuance of a decision, whichever comes first. The response must present argument.

§ 134.912 Discovery and oral hearings.

Discovery will not be permitted. Oral hearings will not be held unless the Judge determines that the dispute cannot be resolved except by the taking of live testimony and the confrontation of witnesses.

§ 134.913 New evidence.

Disputes under this subpart ordinarily will be decided based on the pleadings and the administrative record. The Judge may admit additional evidence upon a motion establishing good cause.

§ 134.914 The decision.

The Judge will issue his or her decision within 45 calendar days after close of the record, as practicable. The Judge's decision is final and will not be reconsidered.

§ 134.915 Remand.

If OHA grants a Size Standard Petition, OHA will remand the matter to the Office of Size Standards for further analysis. Once remanded, OHA no longer has jurisdiction over the matter unless a new Size Standard Petition is filed as a result of a new final rule published in the Federal Register.

§ 134.916 Effects of OHA's decision.

(a) If OHA grants a Size Standard Petition of a modified or revised size standard, the Administrator will promptly publish a Federal Register notice to suspend the size standard in question and restore the size standard that was in effect before being challenged in the Size Standard Petition, until such time as a new final rule is published in the Federal Register. The OHA decision does not affect the validity of actions issued under the modified or revised size standard prior to the effective date of the notice suspending the size standard. If the size standard in question was newly established, the

Administrator keeps the challenged size standard in effect while conducting further analysis on remand.

(b) If OHA denies a Size Standard Petition, the size standard remains as published in the Federal Register.

§ 134.917 Equal Access to Justice Act.

A prevailing Petitioner is not entitled to recover attorney's fees. Size Standard Petitions are not proceedings that are required to be conducted by an Administrative Law Judge under § 134.603.

§ 134.918 Judicial review.

The publication of a final rule in the Federal Register is considered the final agency action for purposes of seeking judicial review.

Dated: September 29, 2016.

Maria Contreras-Sweet,
Administrator.

[FR Doc. 2016-24231 Filed: 10/6/2016 8:45 am; Publication Date: 10/7/2016]